UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CULTURAL CARE, INC. d/b/a CULTURAL CARE AU PAIR, ERIN CAPRON, and JEFFREY PENEDO,

Plaintiffs,

v.

OFFICE OF THE ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS and MAURA T. HEALEY, IN HER CAPACITY AS ATTORNEY GENERAL OF THE COMMONWEALTH OF MASSACHUSETTS ,

Defendants.

Civil Action
No. 16-11777-JCB

**REPLY BRIEF IN SUPPORT
OF DEFENDANTS' MOTION TO DISMISS**

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ARGUMENT

Defendants respectfully submit this reply in support of their motion to dismiss plaintiffs' complaint in its entirety.

I. THE LAWS AND REGULATIONS GOVERNING THE AU PAIR PROGRAM PROVIDE THAT THEY MAY BE SUPPLEMENTED BY FEDERAL AND STATE WORKER PROTECTIONS.

All of plaintiffs' claims against the Massachusetts Domestic Workers' Bill of Rights, M.G.L. ch. 149, §§ 190-191 – as well as any other state labor law that plaintiffs may appear to challenge[1] – fail for two basic reasons: (i) State Department regulations provide that the Fair Labor Standards Act ("FLSA") applies to au pairs, and (ii) the FLSA provides that states' wage and hour laws are not preempted. *See* 22 C.F.R. § 62.31(j)(1) (requiring that au pairs be "paid in conformance with the requirements of the [FLSA]"); 29 U.S.C. § 218(a) ("No provision of [the FLSA] shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter"). Plaintiffs attack these points from many directions in their opposition (Dkt. #21), but never hit their mark.

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[1] Much of plaintiffs' opposition is irrelevant to the claims in their complaint. The plaintiffs address Massachusetts's Minimum Fair Wage Law, M.G.L. ch. 151, at length, even though they do not allege in the complaint that the law is preempted or unconstitutional. For example, they attack "the application of state wage and hour laws" to au pairs, highlight differences between the federal and Massachusetts minimum wage laws, and complain that the Office of Attorney General has never before "attempted to enforce state labor laws (like the minimum wage) with respect to *au pairs*." Dkt. #21 at 1, 11, 23. In their complaint, however, plaintiffs seek declaratory and injunctive relief against only the Domestic Workers law and supporting Attorney General regulations. *See* Compl., Prayer for Relief. They now argue that Massachusetts's minimum wage and overtime requirements "are effectively incorporated" in the Domestic Workers regulations. Dkt. #21 at 11 n.6, 22 n.11 (citing 940 C.M.R. § 32.03(3), 5(b)-(c)). But while those regulations at times refer to provisions of the Minimum Fair Wage Law in the course of clarifying the rights of domestic workers, *see, e.g.*, 940 C.M.R. § 32.03(3) (providing that a domestic worker should receive overtime pay as provided in M.G.L. ch. 151, § 1A, even if she works "for an employer in both residential and commercial settings"), they do not categorically incorporate, and certainly do not supplant, preexisting minimum wage protections. For this reason, even if this Court were to grant the relief that plaintiffs' complaint demands, it would have little to no effect on the issues they are discussing now.

A. Federal Agencies Made a Deliberate and Unequivocal Decision to Apply the Wage and Hour Protections of the FLSA to Au Pairs.

Throughout their brief, plaintiffs attempt to minimize the impact of the FLSA by claiming that its wage and hour protections do not generally apply to au pairs. The responsible federal agencies, plaintiffs assert, have not "comprehensively" applied the FLSA to au pair program, Dkt. #21 at 1, but rather "borrowed only certain limited pieces of the FLSA," *id.* at 8; *see also id.* at 19 ("the [State Department] uses the FLSA minimum wage to calculate the stipend, but has not mandated that the FLSA applies to *au pairs* in its entirety"). That claim is incorrect. As the district court observed in *Beltran*, federal regulations "expressly provide[] that the au pair program **must** conform with the FLSA, **without exception**," and the FLSA in turn "explicitly provides that, if a state sets a higher minimum wage than that mandated by the FLSA, employees within that state are entitled to receive that higher wage." *Beltran v. InterExchange, Inc.*, 176 F. Supp. 3d 1066, 1084 (D. Colo. 2016) (emphasis in original; citing 22 C.F.R. § 62.31(j)(1) and 29 U.S.C. § 218(a)).[2]

The agencies' decision to recognize and reinforce that the FLSA applies to au pairs was deliberate, informed, and unequivocal. In the course of promulgating its au pair regulations in 1995, the U.S. Information Agency ("USIA") reviewed a broad range of criticisms of the program by the General Accounting Office, the Department of Labor, the Immigration and Naturalization Service, Congress, and USIA itself, and those criticisms included employers'

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[2] Plaintiffs argue that the ruling in *Beltran* should be given limited weight because it is preliminary and "does not address the MA Act or the MA Regulations." Dkt. #21 at 11 n.6. But after Cultural Care and the other defendants in that case raised preemption as a ground for dismissing the plaintiffs' state wage law claims, the district court unambiguously ruled that the claims "are not, in fact, preempted by some kind of amorphous 'federal framework.'" 176 F. Supp. 3d at 1084. While the state wage claims still require adjudication, it is unlikely that the court will revisit that preemption ruling in subsequent proceedings. Furthermore, its analysis of the preemption issue focused on the federal regulatory framework, not the particulars of the state laws at issue. *See id.* at 1083-84. In short, Cultural Care made the same argument in *Beltran* that it raises here, and lost.

"failure to comply with the [FLSA] and its requirements governing the payment of minimum wage." Exchange Visitor Program, 60 Fed. Reg. 8547, 8547-48 (Feb. 15, 1995). After USIA sought "the views and guidance of the Department of Labor" on whether au pairs are employees under the FLSA, the Department of Labor determined that they are and that "an employment relationship is established." *Id.* at 8550.[3]

Plaintiffs assert that the Labor Department's "conclusion is questionable," Dkt. #21 at 19, but never endeavor to explain why. They further suggest that USIA did not itself adopt the Labor Department's conclusion, but rather "merely report[ed]" it. *Id.* In fact, USIA stated that it would defer to the Labor Department's conclusion under *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), because it is "the Federal agency entrusted with regulating labor laws, including the definition of employer and employee and determining when an employment relationship is established." 60 Fed. Reg. at 8550. Furthermore, to assist the public's understanding of this issue, USIA set forth its own detailed analysis, explaining why under the FLSA and controlling case law "an au pair is an employee." *Id.* at 8550-51.[4]

Elsewhere, plaintiffs acknowledge that in its 1997 rule USIA reiterated that "au pair participants are covered under the provisions of the [FLSA] and therefore must receive federal minimum wage." Dkt. #21 at 8-9 (quoting Exchange Visitor Program, 62 Fed. Reg. 34,632,

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[3] While plaintiffs repeatedly assert that Congress did not intend the au pair program to be a "work program," *see, e.g.*, Dkt. #21 at 2, 4, 24-25 n.14, the responsible federal agencies have recognized since at least 1995 that there is a "work component that is an integral part of that program," 60 Fed. Reg. at 8550. That recognition underlies their conclusions that "an employment relationship" exists between au pairs and their host families, *id.*, and that au pairs are "employees" protected by the FLSA, *id.* at 8550-51.

[4] Plaintiffs argue that "the USIA could not delegate its statutory authority to administer the Au Pair Program to the DOL," Dkt. #21 at 8, but that is not what USIA or the State Department did. Rather, exercising the authority given to them by Congress, the agencies issued regulations providing that au pair sponsors like Cultural Care "shall require" that au pairs be "paid in conformance with the requirements of the Fair Labor Standards Act as interpreted and implemented by the United States Department of Labor." 22 C.F.R. § 62.31(j) & (j)(1).

34,633 (June 27, 1997)). Nevertheless, they argue that "[d]espite this seemingly broad statement" the rule "did not purport to adopt the FLSA or state wage and hour laws in their entirety, nor suggest that they apply by their terms." *Id.* at 9. Again, however, the rule provides unequivocally that au pairs must be "compensated at a weekly rate based upon 45 hours per week and paid in conformance with the requirements of the [FLSA] as interpreted and implemented by the United States Department of Labor." 62 Fed. Reg. at 34,634 (codified at 22 C.F.R. § 62.31(j)(1)). Plaintiffs argue that, if the agencies really intended the FLSA to apply, they would have written "the FLSA applies." Dkt. #21 at 19. That is a meaningless distinction; any reasonable reader of the command that au pairs must be "paid in conformance with the requirements" of the FLSA will understand that the payment requirements of FLSA "apply" to them.

Congress effectively ratified USIA's determination that au pairs are employees protected by the FLSA by directing the agency to report in detail on "the compliance of all au pair organizations with regulations governing au pair programs as published on February 15, 1995." Au Pair Programs, Extension, Pub. L. No. 104-72, 109 Stat. 776 (1995). Plaintiffs try to downplay this congressional directive by asserting that the 1995 regulation "had not adopted or incorporated the full FLSA," Dkt. #21 at 8, but, again, those regulations made clear that au pairs are employees protected by the Act. 60 Fed. Reg. at 8550-51. Plaintiffs argue that when Congress permanently authorized the au pair program in October 1997, Extension of Au Pair Programs, Pub. L. No. 105-48, 111 Stat. 1165 (1997), "nothing in this statute suggest[ed] that Congress intended to depart from the established terms of the *Au Pair* Program." Dkt. #21 at 9; *see also id.* at 14-15. But by then, the established terms of the program included not only the controlling determination from 1995 that au pairs are FLSA-protected employees, but also the additional final rule – issued in June 1997 to "ensure that there is no future confusion regarding the payment of minimum wage" – that resulted in the current regulation that "au pair participants" must be "paid in conformance with the requirements of the [FLSA]." 62 Fed. Reg. at 34,634 (codified at 22 C.F.R. § 62.31(j)(1)).[5]

Finally, Congress has mandated that the State Department require sponsors to inform au pairs about their rights, including "the legal rights of employment or education-based nonimmigrant visa holders under Federal immigration, labor and employment law." 8 U.S.C § 1375b(b)(2). Published on the State Department web site, the Wilberforce Pamphlet informs au pairs that they have "the right to earn at least the federal legal minimum wage for most jobs" and may be entitled to "earn more than the federal minimum wage" if they work "in a state, city, or county that has a higher minimum wage." Dkt. #20, Attach. G at 2. Plaintiffs now argue that neither the statute nor pamphlet are "specific to au pairs." Dkt. #21 at 18; *see also id.* (stating that Wilberforce Pamphlet "is written generically without specifying particular visa holders to which the statements apply"). But the Wilberforce Trafficking Act is intended to protect "aliens applying for employment- or education-based nonimmigrant visas," which includes au pairs, 8 U.S.C § 1375b(a)(1), and since 2014 the State Department has required sponsors to provide the

[5] Plaintiffs retreat from their allegation that Congress directly authorized the au pair program in 1986, *see* Compl. ¶ 10, by acknowledging that the initial pilot program was authorized by USIA alone. Dkt. #21 at 5 & n.2. But they proceed to argue that Congress effectively rejected all criticism of the au pair program in the 1980s by allowing the program to continue unaltered after that. Dkt. #21 at 5-6. In fact, Congress's decision to allow a two-year continuation of the program in 1988 was conditioned on GAO's examination of whether "the participants in programs of cultural exchange receiving [J visas] are performing activities consistent with" congressional intent. Pub. L. No. 100-461, § 555. 102 Stat. 2268 (1988). That GAO report, issued in 1990, led directly to USIA's decisions to revise and further regulate the au pair program in 1995 and 1997 to make it more consistent with the purpose of Congress. *See* 60 Fed. Reg. at 8548 (citing GAO findings that the "au pair (Child Care)" program is "inconsistent with the legislative intent" and dilutes "the integrity of the J visa"). And the 1995 and June 1997 regulations became part of the au pair program's "established terms" when Congress permanently authorized it in October 1997.

Wilberforce Pamphlet to au pairs. Exchange Visitor Program – General Provisions, 79 Fed. Reg. 60,294, 60,314 (Oct. 6, 2014) (codified at 22 C.F.R. § 62.10(c)(8)). Plaintiffs also argue that because the Wilberforce Pamphlet specifically discusses the employment rights of some visa holders, but not of au pairs, this Court should interpret the pamphlet as evidence that "state employment law does not apply to *au pairs*." Dkt. #21 at 18. But the Wilberforce Pamphlet states that *all* visa holders "may be entitled" to earn more than the federal minimum wage if they work in a state that provides for it. Plaintiffs' argument by negative implication falls far short of the kind of "clear and manifest" evidence that would be required to establish valid claims against the Domestic Workers law.

B. The FLSA Explicitly Contemplates Supplemental State Worker Protections.

Because au pairs are employees protected by the FLSA, they are entitled to the benefits of applicable state worker protection laws as well. The savings clause of the FLSA provides that "[n]o provision of this [Act] or of any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this [Act] or a maximum work week lower than the maximum workweek established under this chapter." 29 U.S.C. § 218(a). The First Circuit aptly summarized this clause as follows: "The FLSA does not expressly prohibit state legislation in the area of wages and working conditions. 'To the contrary, it (FLSA) specifically contemplates state regulation' of labor conditions." *Maccabees Mut. Life Ins. Co. v. Perez-Rosado*, 641 F.2d 45, 46 (1st Cir. 1981) (quoting *Doctors Hosp., Inc. v. Silva Recio*, 558 F.2d 619, 622 (1st Cir. 1977)).

In their opposition, plaintiffs argue that the ruling in *Maccabees* applies only when an employer argues "against applying more generous state law" because it "is complying with federal law." Dkt. #21 at 20 n.10. Even if that characterization were accurate, it is fatal to plaintiffs' preemption claim here, the essence of which is that plaintiffs' purported compliance with federal rules should excuse their noncompliance with state law.

Citing *Ellis v. Edward D. Jones & Co., L.P.*, 527 F. Supp. 2d 439, 451 (W.D. Pa. 2007), plaintiffs argue that the FLSA's saving clause "is not a backdoor to apply state labor laws that are otherwise preempted." However, that ruling in *Ellis* involved a completely different issue – the relationship between the opt-out mechanism of Fed. R. Civ. P. 23 and the opt-in scheme of FLSA collective actions – and that ruling has since been overruled by the Third Circuit and rejected by all other circuit courts that have addressed the issue. *See Knepper v. Rite Aid Corp.*, 675 F.3d 249, 258-59 (3d Cir. 2012), and cited cases. Furthermore, even the court in *Ellis* acknowledged the principle at issue here: the terms of the FLSA's savings clause "establish a wage and hour 'floor' above which the states are free to rise." 527 F. Supp. 2d at 451.

Citing *Cosme Nieves v. Deshler*, 786 F.2d 445 (1st Cir. 1986), plaintiffs argue that the savings clause is inapplicable because it does not confer "state law rights that do not otherwise apply." Dkt. #21 at 19-20. But it is *Cosme Nieves* that does not apply here. In that case, the plaintiffs argued that they should receive the benefits of any existing Puerto Rico laws that are more favorable to them – even if those laws explicitly exclude them from coverage. 786 F.2d at 451-52. Not surprisingly, the First Circuit rejected this argument, explaining that the FLSA "certainly does not guarantee" persons the benefit of state laws that "do not of their own force apply" to them. *Id.* at 452. Here, by contrast, plaintiffs do not dispute that (unless preempted) the Domestic Workers law and regulations will apply to au pairs in Massachusetts. *See generally* 940 C.M.R. § 32.02 (definition of "domestic worker"). Because the state law and regulations apply "of their own force" to au pairs, and because the federal law provides that au pairs must be paid in conformance with the requirements of the FLSA (which sets a floor that states may exceed), all plaintiffs' claims against the Domestic Workers law must be dismissed. *See, e.g.*, *Cosme Nieves*, 786 F.2d at 452 (stating that "the FLSA does not preempt any existing state law that establishes a higher minimum wage or a shorter workweek than the federal statute").

II. PLAINTIFFS' PREEMPTION CLAIMS MUST BE DISMISSED.

Plaintiffs do not dispute that because their preemption claims are facial in nature, they must establish that there is "no set of circumstances" under which this law "would be valid." *Pharm. Research & Mfrs. of Am. v. Concannon*, 249 F.3d 66, 77 (1st Cir. 2001) (citation omitted). They also acknowledge that they must demonstrate a "clear and manifest" intent by Congress to overcome the well-established presumption against preemption. Dkt. #21 at 13. Because plaintiffs cannot meet these demanding standards, their preemption claims should be dismissed.

A. Federal Law Does Not Preempt the Field of Worker Protection Laws.

Plaintiffs' claim for implied field preemption fails because they cannot show a framework of regulation "so pervasive … that Congress left no room for the States to supplement it" on labor protection issues. *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012) (citation omitted). Far from precluding state supplementation, the State Department regulations governing the au pair program contemplate concurrent compliance with federal and state labor protections. Plaintiffs assert that au pairs must be treated as "visitors in furtherance of mutual understanding," not "employees," Dkt. #21 at 14, and that they arrive in the United States for "cultural exchange, not work exchange," *id.* at 16. The federal regulations, however, recognize au pairs as protected employees and make clear that the FLSA and its savings clause apply. *See*

§ I, *supra*.[6] An intention to preempt "is impossible to divine" where regulations "expressly contemplate coincident compliance with state law as well as federal law." *Cal. Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 583-84 (1987).

Plaintiffs try to shift the focus by arguing that the relevant field is "exchange visitor programs," or alternatively "visa programs," "immigration," or "foreign relations." Dkt. #21 at 14-15. However, the Domestic Workers law does not regulate those fields, but rather establishes conditions for domestic workers in the Commonwealth, without regard to their national original or immigration status. *See English v. Gen. Elec. Co.*, 496 U.S. 72, 85 (1990) (preempted field is defined by reference to state law's purpose and effect). That is an exercise of Massachusetts's "broad authority under the police powers to regulate the employment relationship to protect workers within the State," and courts will not infer preemption of this field from federal law absent "a demonstration that complete ouster of state power … was the clear and manifest purpose of Congress." *De Canas v. Bica*, 424 U.S. 351, 356-57 (1976).

Relying on Ninth Circuit precedent, plaintiffs invoke what they describe as a form of "field preemption or 'dormant foreign affairs preemption,'" which applies "even in the absence of any express federal policy." Dkt. #21 at 15 (citing *Movsesian v. Victoria Vershicherung AG*, 670 F.3d 1067, 1072 (9th Cir. 2012)). That approach, however, has not been adopted by either the First Circuit or the Supreme Court. *See Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 419-20 (2003) (declining to decide whether theory of field preemption applies to executive foreign relations power); *see also id.* at 419 n.11 (indicating that field preemption would not apply where state has addressed "a traditional state responsibility"). Furthermore, even if this Court were to apply the Ninth Circuit's holding, dismissal would still be proper because Massachusetts has not "intrude[d] on a matter of foreign policy with no real claim to be addressing an area of traditional state responsibility." *Movsesian*, 670 F.3d at 1075. The Domestic Workers law does not bring Massachusetts into contact with any foreign government, comment on foreign affairs, or otherwise intrude on foreign policy. Instead, it addresses an area of traditional state responsibility – the protection of vulnerable workers.

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[6] Indeed, the regulations repeatedly refer to the need to comply with state and local law. For example, they require au pair sponsors to appoint officers who are "thoroughly familiar" with all pertinent "state regulations and laws," and, if they work with programs "with an employment component," they must have "a detailed knowledge of federal, state, and local laws pertaining to employment, including the Fair Labor Standards Act." 22 C.F.R. § 62.11(a). Plaintiffs suggest that this regulation is inapplicable because the au pair program does not have "an employment component," Dkt. #21 at 17-18, but the responsible federal agencies have concluded otherwise, *see, e.g.*, 60 Fed. Reg. at 8550 (stating that a "work component" is "an integral part" of au pair program).

Plaintiffs also cite *Wisconsin Central, Ltd. v. Shannon*, 539 F.3d 751 (7th Cir. 2008), for the proposition that "[w]hen Congress acts explicitly to control and occupy the field …, state laws – including state labor laws – cannot apply." Dkt. #21 at 15-16. Judge Zobel recently rejected this same argument, explaining that the Seventh Circuit's ruling in *Wisconsin Central* involved a "long history of pervasive congressional regulation over the railway industry," touching on nearly every aspect of the industry including labor relations, hours of work, and worker safety. *See Labor Relations Div. of Constr. Indus. of Mass. v. Healey*, No. 15-10116-RWZ, 2015 WL 4508646, at *6 n.6 (July 9, 2015), *appeal docketed*, No. 15-1906 (1st Cir. Aug. 12, 2015). The idea of "pervasive regulation," Judge Zobel explained, does not apply in "the general labor law context, where the Supreme Court has cautioned that courts must not usurp the States' 'broad authority under their police powers to regulate the employment relationship to protect workers within the State.'" *Id.* (quoting *Metro. Life Ins. Co. v. Mass.*, 471 U.S. 724, 756 (1985)).[7]

[7] Plaintiffs also cite *Bai Haiyan v. Hamden Pub. Schools*, 875 F. Supp. 2d 109 (D. Conn. 2012), *see* Dkt. #21 at 16, but that case did not deal with preemption at all. There, after the plaintiff, a participant in the Chinese Guest Teacher Program, brought employment claims against local school officials, the court found that the regulations implementing the program and the memorandum of understanding pertaining to

B. The Domestic Workers Law Does Not Interpose an Obstacle to Congress's Objectives.

As for implied conflict preemption, plaintiffs state that they "disput[e]" defendants' argument that compliance with both state and federal regulations is not "physically impossible," Dkt. #21 at 21, but do not elaborate. They restate nearly verbatim alleged "contradictions" between federal and state requirements, *compare* Compl. ¶ 31 *with* Dkt. #21 at 10-11, but do not rebut any of defendants' explanation why they do not show the impossibility required for a preemption claim, *see* Dkt. #20 at 20-24.

Instead, plaintiffs argue that compliance with the Domestic Workers law would "frustrate the purpose of federal law." Dkt. #21 at 20. The actual test is whether the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona*, 132 S. Ct. at 2501 (citation omitted). Because the Fulbright-Hays Act does not refer even indirectly to worker protections, it is inconceivable that the application of state worker protection laws to au pairs would obstruct the Act's objectives or purposes. *See Freightliner Corp. v. Myrick*, 514 U.S. 280, 289 (1995). Plaintiffs now argue that *Freightliner* addressed only express preemption, Dkt. #21 at 25, but that is wrong: the Court ruled that a claim for "implied conflict pre-emption" is "futile" when the federal law "simply fails to address" the subject of the state law "at all." *Id.* at 288-89; *see also In re Celexa & Lexapro Mkt. & Sales Practice Litig.*, 779 F.3d 34, 40 (1st Cir. 2015) (citing *Freightliner* for its discussion of conflict preemption).

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her placement as a teacher did not create an employment relationship with the local school district. 875 F. Supp. 2d at 126-27. As the Magistrate Judge explained in *Beltran*, "[t]he *Bai Haiyan* decision is distinguishable from the present case because applicable federal law makes clear that *au pairs* are in an employment relationship." *Beltran v. Interexchange, Inc.*, No. 14-cv-03074-CMA-KMT, 2016 WL 695967, at *13 n.9 (D. Colo. Feb. 22, 2016).

Plaintiffs cite *Fidelity Federal Savings & Loan Association v. de la Cuesta*, 458 U.S. 141 (1982), as support for their "frustration of purpose" theory, Dkt. #21 at 23-24, but in that case the federal agency's "intent to pre-empt" state law was "unambiguous," *id.* at 155; *see also id.* at 158 (referring to regulatory language that "unequivocally expresses the Board's determination to displace state law"). Other cases relied on by plaintiffs similarly involved clear evidence of federal preemptive intent.[8] Here, by contrast, there is no evidence that Congress, USIA, or the State Department have ever intended to preempt state worker protection laws. To the contrary, as discussed in § I, *supra*, the State Department regulations contemplate that au pairs will be protected by supplemental state worker protection laws like the Domestic Worker law, and au pairs are informed of those potential state-law rights through the Wilberforce Pamphlet published by the Department.

In their complaint, plaintiffs asserted, implausibly, that the application of state worker protection laws conflicts with the goal of building "a peaceful world in which freedom and justice under law will be the lot of all mankind." *See, e.g.*, Compl. ¶¶ 7-8, 39, 43. Now, they argue that conflict preemption applies due to an overriding federal "desire for uniformity." Dkt. #21 at 24. Plaintiffs emphasize remarks by USIA in 1995 regarding its interest in ensuring "uniform compensation" for au pairs. *See id.* at 6, 7, 8, 11 n.7, 24. But as the court observed in *Beltran*, plaintiffs' reliance on those remarks is "misleading." 176 F. Supp. 3d at 1084. In

[8] *See, e.g.*, *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 99 (1992) (finding congressional intent that "a State may not enforce its own occupational safety and health standards without obtaining" approval of Secretary of Labor); *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 374-77 (2000) (discussing "clear" and "manifest" intent of Congress to limit economic pressure against Burma "to a specific range"); *Farina v. Nokia, Inc.*, 625 F.3d 97, 123 (3d Cir. 2010) (observing that federal agency "has long asserted that uniformity in the technical standards governing wireless services is necessary to ensure an efficient nationwide system"); *Weaver's Cove Energy, LLC v. R.I. Coastal Res. Mgmt.*, 589 F.3d 458, 473 (1st Cir. 2009) (federal agency interpreted dredging activities "to be within its preemptive jurisdiction").

discussing the amount of credit a host family could use for room and board provided to an au pair, the USIA "weighed the preference for crediting actual cost against the need for the credit to be uniform so that host families would not have to maintain individualized records." *Id.* (discussing 60 Fed. Reg. at 8551). The agency changed course in 1997 and adopted new regulations that contain no mention of a formula or "uniform stipend," but rather provide that sponsors must ensure that au pairs are "compensated at a weekly rate based upon 45 hours per week and paid in conformance with the requirements of the [FLSA] as interpreted and implemented by the United States Department of Labor." *Id.* at 1081 (quoting 62 Fed. Reg. at 34634 and 22 C.F.R. § 62.31(j)(1)). The "plain language" of those regulations, which still apply today, compel dismissal of plaintiffs' claim here. *Id.* at 1082.

Plaintiffs also cite a variety of cost and administrative concerns, but none of them support their claim for conflict preemption. They argue, for example, that application of the Minimum Fair Wage Law and the Domestic Workers law would make "the stipend calculation … extremely complicated," and might make it "economically infeasible" for families to use au pairs as "an affordable childcare option." Dkt. #21 at 21-22. Even if that were true,[9] there is nothing

[9] Contrary to plaintiffs' suggestion, Dkt. #21 at 22, neither defendants nor this Court need resolve every technical detail as to how the Domestic Workers law will apply to au pairs in Massachusetts; that would go far beyond the depth of inquiry required to resolve plaintiffs' facial challenge. *See Wash. State Grange v. Wash. State Repub. Party*, 552 U.S. 442, 449-50 (2008) (federal court may not "go beyond the statute's facial requirements" where state "has had no opportunity to implement" new law "and its courts have had no occasion to construe the law in the context of actual disputes"). This Court can, however, take notice that there is a plausible claim that the *current* method used by sponsors to calculate au pair stipends violates the FLSA. *See Beltran*, 176 F. Supp. 3d at 1082-83. Plaintiffs argue that it is "clear" from a series of State Department notices "that DOS believes the [room and board] credit is proper," Dkt. #21 at 23 n.13, but the last of those notices was issued in 2007 and it is unclear whether the Department stands by them today. Even if it did, plaintiffs "have cited no legal authority for the notion that the conduct of an agency like the DOS can somehow trump the plain language of a regulation." *Beltran*, 176 F. Supp. 3d at 1082.

in the Fulbright-Hays Act or State Department regulations that recognizes the affordability of this particular kind of childcare or simplicity in au pair stipend calculations as federal objectives.

Lastly, plaintiffs argue that conflict preemption applies because (i) it is inconceivable that au pairs might "receive substantially better pay and benefits than domestic workers employed to provide childcare," and (ii) "treating *au pairs* as employees" would conflict with other laws that limit work visas to positions that "cannot be filled by domestic labor." Dkt. #21 at 25-26. These arguments merit little response. The fact that au pairs may receive certain benefits that other workers do not – such as a limitation on how many hours they may work per week, *see* 22 C.F.R. § 62.31(c)(2) – "presents no conflict whatsoever." *Beltran*, 176 F. Supp. 3d at 1082 n.19. The fact that Congress limits issuance of certain visas to fields where there are insufficient U.S. workers, *see, e.g.*, 8 C.F.R. § 214.2(h)(6)(i) (H-2b temporary non-agricultural workers), does not establish a general "law" or "mandate" that applies to J visas and au pairs as well. Finally, as discussed in § I, *supra*, the federal government *does* treat au pairs as "employees," and that fact is fatal to all of plaintiffs' claims.

III. CULTURAL CARE'S COMMERCE CLAUSE CLAIMS MUST BE DISMISSED.

Cultural Care's constitutional challenge to the Domestic Workers law and its regulations should also be dismissed.

First, its claims do not fall within the zone of interests protected by the dormant Commerce Clause: *i.e.*, injuries resulting from a protectionist barrier imposed on interstate (or foreign) commerce. *See Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178, 188 (1st Cir. 1999) (purpose of Commerce Clause is to prevent "protectionist policies"). Cultural Care argues that, as a result of "economic infeasibility" caused by the Domestic Workers law, it "will be unable to place *au pairs* in Massachusetts, causing material economic injury to its business."

Dkt. #21 at 27. But even if that were true, the inability would affect Cultural Care in the same way it would affect all of Cultural Care's competitors, headquartered in Massachusetts or any other state, who place au pairs in Massachusetts. It is thus completely unrelated to economic protectionism. Further, because Cultural Care is a Massachusetts-based enterprise, even if some sort of "favoritism" existed in Massachusetts, Cultural Care could not "conceivably have suffered any cognizable harm as a result of it." *Wine & Spirits Retailers, Inc. v. Rhode Island*, 481 F.3d 1 (1st Cir 2007).

Cultural Care fares no better on the merits. Citing *Tri-M Group, LLC v. Sharp*, 638 F.3d 406 (3rd Cir. 2011), it argues that the Domestic Workers law will force it to "surrender whatever competitive advantages [it] may possess" by decreasing its opportunity to offer to Massachusetts families the services of au pairs instead of – in Cultural Care's words – "ordinary domestic worker[s]." Dkt. #21 at 29. Tellingly, however, Cultural Care fails to note that the very language it quotes from the Third Circuit refers to states that "shield in-state businesses from out-of-state competition" and "state laws that discriminate against out-of-state businesses." 638 F.3d at 426-27 (quoting *Cloverland-Green Spring Dairies, Inc. v. Pa. Milk Mktg. Bd.*, 298 F.3d 201, 210 (3d Cir. 2002)). There is no such discrimination here.

Cultural Care also argues that while the Domestic Workers law is facially neutral, it violates the Commerce Clause because it "disproportionately targets entities operating in interstate commerce." Dkt. #21 at 29 (citing *Cachia v. Islamorada*, 542 F.3d 839 (11th Cir. 2008)). The Eleventh Circuit case that Cultural Care cites is not good law in the First Circuit. *See Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 404 n.7 (9th Cir. 2015) (observing that *Cachia* is "at odds" with First Circuit's holding in *Wine & Spirits Retailers*, 481 F.3d at 15, that a "negative impact on [plaintiff's] business model is, in itself, insufficient to show discriminatory effect"), *cert. denied*, 136 S. Ct. 1838 (2016). Furthermore, even in *Cachia* the Eleventh Circuit identified aspects of the state law at issue that had "the practical effect of discriminating against interstate commerce," 542 F.3d at 843; Cultural Care cannot do that with respect to the Domestic Workers law here.

This case closely resembles *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126 (1978), where the Supreme Court emphatically rejected the idea that a "claim of discrimination against interstate commerce" can be established by the fact that "the burden of a state regulation falls on some interstate companies." Cultural Care argues that complying with "state and federal regulations layered on top of each other" may make families in Massachusetts less likely to participate in the au pair program, hurting Cultural Care's bottom line. Dkt. #21 at 29. Again, however, that purported impact would fall on all au pair companies, regardless of where they are located.[10]

Finally, Cultural Care does not state a plausible claim for relief involving the dormant Foreign Commerce Clause. The Domestic Workers law has no impact on trade between foreign nations. Cultural Care argues that the law will prevent Congress "from 'speaking with one voice' with respect to the *Au Pair* Program," Dkt. #21 at 28, but the decision it quotes involved the need for a unitary voice "in foreign affairs" – not how programs are administered in the United States. *See Nat'l Foreign Trade Council v. Natsios*, 181 F.3d 38, 68 (1st Cir. 1999). Cultural Care also invokes the supposed federal interest in ensuring that au pairs "receive uniform compensation," but even setting aside its misleading reliance on that stray remark by USIA, *see* § II.B, *supra*, an interest in how au pairs are compensated does not remotely support a Foreign Commerce Clause claim. Dismissal is appropriate.

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[10] Cultural Care has no response to the point that, in protecting vulnerable workers in Massachusetts, the Domestic Workers law is precisely the kind of traditional state law that falls outside the reach of the dormant Commerce Clause. *Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 341-42 (2008) (citing *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 343-44 (2007)). And it ignores the fact that Congress ratified the USIA's determination that au pairs are FLSA-protected employees by mandating a detailed report on "the compliance of all au pair organizations" with the agency's 1995 regulations. Au Pair Programs, Extension, Pub. L. No. 104-72, 109 Stat. 776 (1995).

CONCLUSION

For the reasons stated above and in defendants' initial memorandum of law, plaintiffs' complaint should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that this document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and that paper copies will be sent to those indicated as non-registered participants on December 15, 2016.

/s/ Robert E. Toone